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Issue Date: 05 February 2007

CASE NO.: 2006-LHC-00841

OWCP NO. 15-048116

In the Matter of

K.S.,

Claimant,

v.

CHUGACH SUPPORT SERVICES,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Carrier.

Appearances:

Steven M. Birnbaum, Esq.
For Claimant

Michael L. Martin, Esq.
For Employer/Carrier

Before: The Honorable Gerald M. Etchingham
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* Claimant K.S. ("Claimant") seeks compensation and medical benefits for a psychological condition sustained in the course and scope of his employment as an environmental specialist for Employer Chugach Support Services ("Employer"), a United States military contractor which was operating in 2004 on a reservation located on Wake Island.

A hearing was held on August 17, 2006, in San Francisco, California. All parties were represented by counsel. Claimant's exhibits ("CX") 1, 2, 2A, 3-10, Employer's exhibits ("EX") 1-2, and Administrative Law Judge exhibits ("ALJX") 1-7 were admitted as amended. TR at 5-

11, 14-15. At the close of the hearing, the record was left open for the submission of post-trial briefs, which were filed by Claimant and Employer and were admitted into evidence on September 19, 2006 as ALJX 8 and 9, respectively. TR at 123-26.

I. STIPULATIONS

At the hearing (TR at 13-14), the parties stipulated to the following:

1. The incident that is alleged to have caused the psychological injury to Claimant occurred on August 14, 2004. CX 5 at 18-52; CX 8 at 61; and CX 10 at 78.
2. The alleged injury arose out of and in the course of his employment with Employer.
3. At the time of the alleged injury, an employer-employee relationship existed between Claimant and Employer.
4. At the time of the hearing, Claimant was not receiving compensation or medical benefits from Employer.
5. The Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.*, applies to this claim.
6. This claim is for an unscheduled injury.
7. No Special Fund relief is sought.
8. In order to calculate Claimant's average weekly wage, section 10(a) of the Act is applicable.

Because there is substantial evidence in the record to support the foregoing stipulations, I accept them. In addition, the following matters are deemed admitted:

1. Claimant was performing his duties for Employer in a satisfactory manner before he suffered the alleged psychological injury on August 14, 2004 that is the subject of this claim.
2. The work that Claimant performed for Employer prior to August 14, 2004 required repetitious use of motions, such as climbing, bending, and lifting.

See TR at 11-12.

II. ISSUES FOR RESOLUTION

1. Did Claimant develop or aggravate a psychological condition when he responded to an accident scene while working with Employer on August 14, 2004?

2. What is the nature and extent of Claimant's work-related disability, if any?

See ALJX 8 and 9.

III. FINDINGS OF FACT

A. Background Information

At the time of hearing, Claimant was 43 years old and resided in Edmonton, Alberta, Canada. TR at 19. He testified that he was not currently employed, having last worked on May 31, 2005. TR at 19. He worked for Employer on Wake Island, which is located in the South Pacific near Guam, from approximately July 8, 2004 through November 7, 2004. TR at 19-20.

Claimant is a high school graduate, although he had nearly four years of college including math and computer science. TR at 85. He took a 40-hour asbestos training course which qualifies him to supervise asbestos abatement work. TR at 85. He is also certified in handling hazardous materials. TR at 85-86. Claimant has worked with two or more firms doing evaluation and bidding on environmental work. TR at 86.

With regard to his somewhat nomadic work history, Claimant testified that he worked on the Alaska pipeline for just over a year. TR at 86. After college, he worked as a cab driver in Anchorage for about a year. TR at 86. Claimant testified that his taxi driver job ended around the same time he sued the taxi company alleging carbon monoxide exposure in the taxicab. TR at 86-87. After that, Claimant worked with a company called GeoChem, which sold environmental industrial equipment, for about eight years. TR at 87. He next worked for six months at Arrowhead Environmental, and then for six months with a company in New Iberia, Louisiana as an estimator bidding on jobs for environmental work. TR at 87. Claimant was fired from the latter job because he did not get enough work for the company. TR at 87.

Claimant also worked as an office manager for Certified Environmental in Oregon for about eight months. TR at 88. He then went to work for Valley Environmental, also in Oregon, but was laid off after three months. TR at 88. For the next two years, Claimant was self-employed as an environmental consultant in Oregon and Washington, and he lived with his uncle in Washington. TR at 88. Claimant testified that he "made a living" with this business for two years. TR at 88.

B. Claimant's Work with Employer

Claimant returned to Alaska and began working full-time with Employer in October 2003 on Shemya, an island located about a thousand miles off the Alaskan coast. TR at 20, 88-89.

Claimant typically worked 48 hours per week, and was paid eight hours per week overtime at time and a half. TR at 20. He received one pay raise while working in Alaska, from \$17.85 to \$19.18 per hour, about three months into the job. TR 21-23. He explained, however, that the pay raise was retroactive to the time he started the job, so that he was paid \$19.18 per

hour for most of his time in Alaska. TR at 22. Claimant testified that from October 2003 through June 2004, he worked full-time and did not miss any work with the exception of two unpaid breaks totaling seven weeks. TR at 21, 89-90. Claimant took his first three weeks leave at the end of January 2004. TR at 90-91. He also took one month off between his Alaska and Wake Island jobs. TR at 90.

Claimant's gross wages from 2003 and 2004 were \$10,114.75 and \$41,029.22, respectively. CX 2 and CX 2A. His W-2 forms show his earnings with Employer in 2004, and confirm his periods of non-employment as three weeks unpaid at the end of January 2004 and one month between the jobs at Shemya and Wake Island. TR at 91; CX 2.

Claimant originally found the job in Alaska through a posting on Employer's website. TR at 23. He had several physical examinations and phone interviews with Employer's environmental manager before starting the job. TR at 24-25. He did not have a psychological evaluation. TR at 24-25.

Prior to going to Wake Island, Claimant testified that he received two "write-ups" while working in Alaska for Employer. He got sick during training and was written up for not calling before he missed a day of training class. He received a warning. TR at 26. As for the second incident, Claimant explained that it was his duty to handle asbestos, and he was the only person "certified to train" others in the handling of the material. TR at 26-27. According to Claimant, there was a building that was "off-limits" because it contained asbestos, and there had not been sufficient testing inspections to allow general reentry. TR at 27. Claimant's manager apparently told him to authorize reentry of the building, but Claimant refused. TR at 27. Claimant testified that his manager was eventually fired, and although Claimant received a "write-up" for the incident, he was not otherwise disciplined. TR at 27. Claimant also mentioned that on one occasion his manager "got mad at me for putting dry paint in the wrong container." TR at 27. These were the only disciplinary actions or problems Claimant recalled having before going to work for Employer on Wake Island in July 2004. TR at 27-28.

Claimant began working for Employer at Wake Island on July 8, 2004. TR at 19-20; CX 5 at 52. He was paid for the same 48 hours per week at the same rate of \$19.18 per hour as he had received in Alaska. TR at 23.

Claimant's position at Wake Island was "Environmental Specialist." TR at 23; CX 1 at 1-3. He testified that the main aspect of his job was removing stockpiled hazardous materials from the island. TR at 23. None of Claimant's job duties involved work as a medic assisting trauma victims. *See* CX 1. The work primarily related to site cleanup and the facilitation of all operations and practices associated with Solid Waste, Hazardous Waste, Waste Minimization, Recycling, and Resource and Conservation Management. *Id.*

Claimant further testified that did not have any disciplinary problems at Wake Island prior to August 2004, and that he had been enjoying his job. TR at 28. He testified that he had a one-year contract with Employer, but intended to stay at Wake Island for two years. TR at 28.

Claimant's supervisor at Wake Island was Thomas Tiley, with whom Claimant had no problems prior to August 2004. TR at 28-29. However, Claimant did indicate without explanation that he had a problem with a fellow employee prior to August 14, 2004. TR at 24.

Claimant testified that prior to August 14, 2004, he had never had any psychiatric treatment or treatment for alcohol consumption. TR at 25. He later testified, however, that prior to the accident of August 14, 2004, he had been prescribed Zyban, also known as Wellbutrin. He was aware that the drug was an antidepressant, but said it was prescribed to help him stop smoking sometime before going to Wake Island, as referenced in his medical records. TR at 101-102; EX 1 at 73. Claimant further testified that in Alaska, he typically would have a few drinks on Saturday nights but never considered alcohol to be a problem. TR at 25.

Claimant testified that Wake Island is horseshoe shaped, and that there are a total of three islands with the main island being one-half mile wide and seven miles long. He described Wake Island as an atoll with facilities at one end, and that along the lakes of the southern edge of the atoll is a runway. At one end of the runway is a terminal. TR at 29.

Claimant also testified that Wake Island was a difficult place to live because it is so isolated. TR at 30. He said there were only 30 Americans on the island and about 200 Thai workers, most who did not speak English. TR at 30.

Claimant spent a lot of time alone. He had contact with a couple of Thais and some friends he had made on the island. TR at 30. Besides working, Claimant went fishing and diving. TR at 30.

Dr. Neesvig, the lone treating physician on Wake Island during Claimant's employment, arrived on the island shortly after Claimant did. EX 1 at 10-11. Dr. Neesvig, a board certified internal medicine and family practice physician, was employed by Employer while it was operating on Wake Island and is a percipient witness here having credibly observed Claimant while on the island. EX 1 at 10 and exhibit ("Ex") 1 attached thereto.

Dr. Neesvig opined that Wake Island was not a good place for someone like Claimant with an "inadequate personality," as Dr. Neesvig observed that Claimant would "always be walking off by himself" and would make you feel "uncomfortable" to be around him even before August 14, 2004. EX 1 at 17, 19-22, 49. Although Dr. Neesvig does not consider himself a qualified psychiatrist (EX 1 at 49), he opined that Claimant was psychologically disabled the entire time he was at Wake Island. EX 1 at 16. Dr. Neesvig further testified, however, that he was a jack of all medical trades, and while he was not a psychiatric specialist, he was trained in diagnosing Post-traumatic Stress Disorder ("PTSD"). EX 1 at 42-44. In addition, Dr. Neesvig observed that Claimant was a nervous person before August 2004. EX 1 at 16.

Dr. Neesvig testified that throughout Claimant's employment, he "had difficulty relating with people," and none of the American civilians on Wake Island would associate with him. He further testified that Claimant could not handle alcohol and that if he saw Claimant in the bar, he would "just try to avoid him." Dr. Neesvig repeated that Claimant "was just always by himself," and was not accepted by either of the two civilian groups. EX 1 at 17-19. Dr. Neesvig also

testified that any problems one might have can be aggravated by the other people working on Wake Island. EX 1 at 45.

Claimant testified that he did not recall ever being so intoxicated that he was not able to control his actions. TR at 92. Specifically, Claimant did not recall an incident on or about July 17, 2004, during his first weekend on Wake Island. TR at 93. This incident was recorded in a memo contained in his personnel file as his only notable pre-August 14 event, wherein Claimant had been consuming alcohol throughout the evening when at approximately 2:00 a.m., he informed a group at the bar that he had been swimming, enjoyed it, and was going back to the beach to swim some more. TR at 93; CX 5 at 52. Claimant was apparently advised not to go swimming. He left the group and when he returned later he was wearing different clothing. He said he had been swimming nude and his clothes had been washed away by the tide, requiring him to go to his room for new clothing. TR at 92-93. Claimant does not remember any of these events of July 17, 2004, and denied that they occurred. TR at 93.

C. The August 14, 2004 Incident

Claimant testified that an accident occurred on Wake Island on August 14, 2004, while he was working at the main terminal on the east end of the runway. TR at 29. The accident occurred two to three miles away from Claimant's location on the runway's west end. TR at 30. He first heard about the accident over the radio and as an environmental worker, had to respond to the scene because of the possibility of a hazardous waste spill. TR at 31; CX 1 at 1.

Claimant approached the accident scene afterwards and saw an ambulance and something on the runway, but he did not know what it was. TR at 32; CX 5 at 52. Thereafter, Claimant realized it was a person who was "pretty mangled." TR at 32. He described the figure as "contorted" and his head was "chopped up." TR at 32. Claimant discovered that the person had been hit by a vehicle, and Claimant believed that the driver of a pickup truck had fallen asleep at the wheel and hit the victim at about 50 miles per hour, hurling him 90 feet. TR at 32.

The peace officer's final report from Officer Ken Gilpatric, however, states that the driver was traveling at approximately 25 to 35 miles per hour and was attempting to adjust the radio when he struck the victim. CX 5 at 25, 31, 33, and 36. The report continues that "[t]he victim was thrown 60 to 70 feet by the impact and rolled down the runway another 20 to 30 feet before coming to a stop." *Id.* The report concludes by stating that the driver drove back about a mile to summon an ambulance and the victim was transported to the Wake Island dispensary where he was stabilized by medical personnel, taken to a Coast Guard airplane for transport to a medical facility in Guam, and died en route. *Id.* and EX 1 at 38.

Dr. Neesvig testified that the victim was run over by a Thai worker who was blinded by the sun. EX 1 at 38. He recalled that the victim had several severe injuries, the worst being a severely depressed skull fracture. *Id.* While stabilizing the victim's condition before he was flown off the island, Dr. Neesvig testified that the victim was gasping, screaming and flailing his arms. He noted the most severe injury to be the man's head injury but there was also an obvious femoral fracture, multiple contusions, and a lot of facial abrasions – a pretty horrific scene for both a doctor and a lay person. EX 1 at 50-52.

Claimant testified that he was standing right over the victim at the scene of the accident. TR at 32. He testified that he was casually acquainted with the victim, who worked for a different contractor doing repair work or building the runway. TR at 32. Claimant believed he may have known the victim's first name but he could not recall. TR at 33. He and the victim had played pool and had been present together at barbecues and in other places. TR at 33.

Claimant testified that what distressed him most about the scene of the accident was seeing the victim's body and "so much blood." TR at 33-34. Claimant said he saw the victim was barely breathing. Claimant said he yelled to a group of Thai workers to "do something" but they refused, saying they had no training. Claimant asked a man to block the sun away from the victim. He said that running from the victim's head was a pool of blood about eight feet long. He went on to say, "And there was so much blood, and in the sun it was congealing and just spilling over itself." TR at 34.

Claimant testified that he was disturbed because no one did anything to aid the victim. TR at 34-35. He explained, "This place is at the end of the world. You've very limited resources, and it scared the crap out me [*sic*], because if this is how they responded to somebody who is lying and dying on a runway, what are they going to do if something happens to me?" TR at 35.

Claimant further testified that there was no one with medical training at the accident scene and no one who could come. TR at 35. In fact, the fire department medics and an ambulance quickly reached the accident scene. CX 5 at 33, 44-45, and 47; EX 1 at 67-68. Claimant stated that at the time of the accident Dr. Neesvig was off-island dealing with a call from a fishing vessel. TR at 35; EX 1 at 35-36. He further explained that he believed Dr. Neesvig and his medic had left the island the morning of the accident to respond to another emergency. TR at 98. The doctor was called back to the island when he heard of the accident that occurred there. TR at 98-99.

Claimant stated that he was at the scene with the victim also present for a total of 25 to 30 minutes. *Id.* He further testified that he was posted as security for the site for the next ten hours, which entailed "sitting there staring at" the accident scene which had not been "cleaned up." TR at 35-36.

The official report of the incident states that the fire and emergency medical staff responded to the incident at 3:40 p.m. on August 14, 2004 by traveling to the west end of the runway where they found the victim, and took the victim and returned to the clinic at 4:35 p.m. CX 5 at 44-45, 47. Claimant testified that he was aware that the victim was still alive when he was brought to the island infirmary, and when he was placed on a Medi-vac plane and flown off the island. TR at 99-100.

On August 14, 2004, Claimant said he refused to speak with OSHA representatives investigating the accident "because of fear of repercussions...." CX 5 at 52. In addition, Mr. Tiley instructed Claimant to speak with Dr. Neesvig about his concerns but Claimant refused to do so. *Id.*

Claimant believes that the day after the incident was Sunday so he did not work that day. TR at 36. Although his co-workers asked him about what had happened, Claimant testified that he never told anyone except his manager, Mr. Tiley. TR at 36-37. Claimant testified in general without an explanation that there was a “big” discrepancy between the official report of the incident and what he saw. He said he went to Mr. Tiley because there were investigators coming out and Claimant had been told they would want to talk to him about the accident. Claimant said he was “scared” because “it’s a military reservation, and [Employer] is contracted out there. They had reported one thing, I saw another. I was afraid I was going to lose my job.” TR at 37.

Dr. Neesvig prepared an accident report on August 17, 2004 regarding his treatment and diagnosis of the accident victim on August 14, 2004. CX 5 at 48-49. Dr. Neesvig noted that the victim suffered multiple traumatic injuries, the most significant of which and the most likely cause of his demise being his skull fracture, bleeding, laceration, and severe brain injury. *Id.*

Claimant testified that he has seen parts of the official report of the accident and disagrees with the findings contained in it. TR at 41. He further testified that the findings “made me sick” because he and others were commended for their response to the accident. He said it “was like commending somebody for standing around doing nothing while a man lays there dying on the runway.” TR at 42.

Claimant testified that witnessing the accident on August 14, 2004 has produced long-lasting effects on him. TR at 41. He said he has thought about the incident every day for two years, he stated that he cannot go to sleep at night because of it, and he “can’t think straight everyday.” TR at 36. He further testified that after the accident, his sleep patterns changed. TR at 42. He started having “severe nightmares.” TR at 42. He has had different nightmares, but most of them took place on the island and had to do with people dying or Claimant dying, and accidents and helplessness. TR at 43. In one of the nightmares Claimant remembers most vividly, he was diving and ran out of air; there was nobody there, and he died. TR at 43. Claimant testified that he could not sleep and when he did, he would wake up and be unable to get back to sleep. TR at 42. He said that since the accident, he gets four hours of “solid” sleep a night. TR at 42.

Claimant testified that in waking hours, he loses his concentration and cannot focus. TR at 43. He further testified that certain issues began to upset him and he started to try to “protect people” on Wake Island and to protect himself. TR at 43. For example, he explained that as an environmental worker, he works with asbestos, lead and fuels, and had responded to every fuel spill on Shemya and Wake Island since he worked at those locations. He said he has been covered with fuel and asbestos. Yet, he says, he was never issued a respirator. TR at 44. He testified that he has “done everything they’ve asked me. And in return, I can’t even protect myself because they don’t have any of the equipment necessary to do it.” TR at 44.

Claimant had “run-ins” with Mr. Tiley about training and equipment. Claimant requested “proper” training for the Thai workers and a proper-fitting respirator for himself but both requests were denied. TR at 44. Claimant stated that his requests for a respirator were also denied when he worked for Employer in both Alaska and Wake Island, although respirators are

“standard equipment” in his field. TR at 44-45. Claimant testified that he was the person on Wake Island who was most responsible for handling hazardous material. TR at 45; CX 1 at 1.

Claimant testified that he started to “fall apart” after the incident on August 14, 2004. TR at 45. He said he could not control his dreams or thoughts. He testified that the only way he was able to sleep was to drink alcohol. TR at 45. Claimant also said before the accident he would drink occasionally with friends, but afterwards he would drink just to get to sleep. TR at 46. He testified that he would have three to four drinks every night, enough to get him to sleep but not enough to make him drunk. TR at 46. Claimant did not drink during work hours. TR at 49.

Employer’s time-line of events involving Claimant includes an entry on August 17, 2004—which Employer notes “was not officially documented”—wherein it is alleged that Claimant had a verbal altercation with “MDA employee Elizabeth Collier at the Drifter’s Bar” after both had been consuming alcohol. CX 5 at 52. This time-line entry further provides that Claimant had repeated a story told to Ms. Collier when she accused him of being so drunk he did not know what he was doing and they both got loud and Mr. Tiley recommended that he and Ms. Collier walk away from the bar to prevent the situation from getting out of control. *Id.* About a week later, Ms. Collier apologized to Claimant for the incident, but he did not accept the apology allegedly because he felt she was only apologizing because her supervisor recommended that she do so. *Id.*

Claimant further testified that he had an ongoing problem with a fellow employee, a manager, at Wake Island that predated the August 14 incident. TR at 46. About one month after the accident on September 19, 2004, Claimant testified that this manager had “continually harassed” him to the point where Claimant reported it to several people, including his own manager, and was told not to go to parts of the island where the other employee was working. TR at 46; CX 5 at 53. This prevented Claimant from doing his job. TR at 47. Claimant explained that on one occasion, the other employee was demolishing a building without having any environmental samples taken. TR at 47. Claimant said he went to the site and took some samples “just for the record,” which caused the other employee to “[blow] a gasket.” TR at 47. Claimant said that he later on September 19, 2004, he walked into a party and the manager started calling him names. After a couple of drinks, Claimant said to him, “Let’s go.” TR at 47-48. They went outside, fought for about one minute, and then gathered themselves and went back to the party. TR at 48; CX 5 at 53. Claimant testified that he never had another problem with that employee. TR at 48.

After the September 19, 2004 altercation, Claimant was told that both he and the other employee were being terminated for fighting. TR at 48, 107; CX 5 at 53. Claimant acknowledged that he received a termination letter on that date and signed off on it. TR at 107. Claimant denied ever appealing or protesting the termination, but went on to explain that the station manager later called Claimant into his office and told him “we’ve decided not to fire you.” TR at 107-108. Claimant’s termination was later rescinded on September 24, 2004, because he had not been given a company handbook or been told about Employer’s policies. TR at 48; CX 5 at 53. He acknowledged that on October 4, 2004, Mr. Tiley advised him that his current 90-day probationary period would be extended for another 90 days. TR at 109. Employer gave Claimant a second chance to improve his behavior and extended his probationary

period on October 4, 2004, with a stern warning that inappropriate conduct would not be tolerated. CX 5 at 53. At no point in his testimony did Claimant attribute his behavior on September 19, 2004 to the August 14 incident.

Dr. Neesvig recalled the fight involving Claimant and was aware of Employer's strict policy prohibiting fighting among its employees. EX 1 at 23-23. Dr. Neesvig explained that any employee involved in a fight would be fired and asked to leave the island immediately. Ex 1 at 24-25.

Claimant explained that the accident of August 14, 2004 was not the only accident that had occurred on the island, and he referred to another accident involving an Air Force crew without mentioning when this occurred. TR at 57.

Claimant further testified that after the August 2004 incident, he started having disagreements with his manager, Mr. Tiley. TR at 49. Claimant explained that Mr. Tiley started doing asbestos abatement projects even though he had no background in asbestos. TR at 49. Claimant warned Mr. Tiley that he was not certified in asbestos abatement, that the company was not certified, and that the Thai workers Mr. Tiley was planning to use to remove the asbestos were not certified. Claimant advised Mr. Tiley that "he needs to go through EPA and the normal procedures." TR at 49. According to Claimant, Mr. Tiley told him to "stay off the job site" and proceeded with the job using two uncertified Thai workers. TR at 49. Claimant testified that he was given a performance evaluation in which Mr. Tiley stated that he did not think Claimant really wanted to be in the environmental field. TR at 50. Claimant further testified that after he left Employer, Mr. Tiley's department was cited for over 200 environmental violations. TR at 50. He said Mr. Tiley no longer works for Employer, but did not know whether he had been fired. TR at 50.

Claimant testified that Employer "knew that I was on the verge of filing reports that would cause them a lot of problems." TR at 57. Claimant stated that he believed this because he had confided in and sought advice from another manager, whose name he could not recall. TR at 57-58.

Claimant further explained that in October 2004, about one month before he was terminated, he did a "write-up" listing all of the violations and all of the illegal activities by Mr. Tiley in connection with the asbestos abatement project. TR at 59. Claimant testified that he gave copies of the report to Commander Rose, the commanding officer on the island, and to the manager he had confided in. TR at 59. Claimant said he also gave a copy of the report to Mr. Tiley, who begged him not to submit it. TR at 59. Claimant then testified that he did not submit the report until after he left the island, when he gave his findings to "the military" and to "OSHA." TR at 59. This report was not produced at trial or offered into evidence.

Claimant testified that the reason given for his termination was that he had been in a fight with a co-worker two or three months earlier, and had also been involved in another argument. TR at 60. He said the argument occurred at a party, one of those which took place on most Saturday nights on the island. TR at 60. After he had been drinking with some Marines, one of them said he liked Claimant's 'Wake Island' t-shirt, and asked if he wanted to trade shirts. TR at

61. Claimant agreed, but the Marine squad leader expressed that a trade was not acceptable. TR at 61. Claimant testified that he got “pissed off” and started yelling. TR at 61. Claimant was told he was terminated in part because, in Employer’s view, this was “an irresponsible way of reacting to one of our guests.” TR at 61. Claimant later confirmed that his termination occurred as a result of his altercation with some Marines on October 30, 2004. TR at 111. He testified that the argument ended with him walking away. TR at 111. When asked whether he recalled being escorted out of Drifter’s Reef Bar by peace officer Ken Kilpatrick, Claimant said Officer Killpatrick approached him after the argument and said, “Come on, ... [Claimant]. Let’s go home.” TR at 111. Claimant said he and Officer Killpatrick were friends, and that Officer Killpatrick lived right below him. TR at 111. Claimant acknowledged that Officer Killpatrick filled out a security report in connection with the incident. TR at 112.

After the accident of August 14, 2004, Claimant testified that he started spending more time alone. TR at 51. He testified that he sought help for his problems from Ms. Kronstedt because she was “in the medical department,” and he did not feel that Dr. Neesvig was a compassionate person. TR at 51.

Claimant testified that he shared his feelings about the accident with Darby Kronstedt, a medic who assisted Dr. Neesvig on Wake Island, and that he broke down and cried, which he also did at several points during trial. TR at 37-39. Ms. Kronstedt told Claimant to see Dr. Neesvig. TR at 39. The only time Claimant saw Dr. Neesvig in his professional capacity was on November 3, 2004. EX 1 at 15; CX 6 at 54-56.

On November 3, 2004, Claimant saw Dr. Neesvig for the first and only time. CX 6 at 54-55. He told Dr. Neesvig about the August 14 accident and the problems he was having. TR at 51-52. According to Claimant, Dr. Neesvig told him, “you need to get off the island, you need to get treatment.” TR at 52. Four or five days later, Claimant left Wake Island. TR at 52.

Claimant testified about the accuracy of Dr. Neesvig’s report of his visit, dated November 3, 2004. TR at 52. Dr. Neesvig reported that Claimant came to him requesting “personal counseling or psychiatric help.” TR at 52; CX 6 at 54-55. The doctor recorded that Claimant said he was depressed and could not control his emotions. TR at 52; CX 6; EX 1 at 16. Dr. Neesvig’s report of Claimant’s visit also states that Claimant had recently been involved in three incidents “demonstrating inappropriate behavior, and at least one case of violence,” but Claimant testified that this was not accurate as there were only two incidents. TR at 53; CX 6 at 54-55. Claimant testified that the report was accurate, with the exception of the number of incidents involving Claimant. TR at 53; CX 6 at 54-55.

In his deposition, Dr. Neesvig recalled that he believed Claimant was about to leave Wake Island and wanted something in his employment records documenting the emotional problems he said he was having. EX 1 at 16, 22. Dr. Neesvig observed that Claimant’s psychiatric condition had appeared to worsen because Claimant expected to be fired as a result of his involvement in the October 30, 2004 incident. EX 1 at 30-32.

Dr. Neesvig testified that he had hearsay knowledge through the word of mouth network on Wake Island that Claimant was involved in three incidents, as a result of which he was in

trouble with Employer. EX 1 at 60-61. At his deposition, however, Dr. Neesvig could only recall two incidents he had heard about involving Claimant—one involving a Marine and the bar bouncer who escorted Claimant home which occurred on October 30, 2004 shortly before Claimant left the island in November 2004, and another incident prior to August 14, 2004 where Claimant's conduct toward a female shipment coordinator from Honolulu was allegedly inappropriate and unacceptable. EX 1 at 19-20, 60-62.

Dr. Neesvig later testified about a third incident where he observed that Claimant was intoxicated and acting obnoxiously at the Drifter's Bar by insisting that Dr. Neesvig's wife dance with him, even after being turned away. EX 1 at 20-21. This incident also occurred before August 14, 2004 according to Dr. Neesvig. EX 1 at 21. Claimant, however, denied acting inappropriately toward Dr. Neesvig's wife. TR at 94-98. He said that she asked him to dance. TR at 98. Moreover, Claimant alleges that Dr. Neesvig's wife was in her 80s at the time that she asked to him dance. CX 5 at 52.

Dr. Neesvig, who, as previously noted, is a board certified internal medicine and family practice physician with 35 years of medical experience, reported that Claimant felt "his emotional problems and behavior problems may be related to his being a witness to a fatal accident that occurred here on the island in August 2004." TR at 53; EX 1 at 8, 29 and Ex 1 at 1 and 2. Claimant testified that he was aware that Dr. Neesvig saw the victim of the August 14 accident and that the doctor had testified that it was "horrific." TR at 53; EX 1 at 52.

On November 3, 2004, treating physician Dr. Neesvig diagnosed Claimant with "depression anxiety" and prescribed Ativan, which Claimant believes is an anti-depressant and which Dr. Neesvig described as a "mild tranquilizer, low dose." TR at 53, 55; EX 1 at 16. Claimant mentioned to Dr. Neesvig that he was having flashbacks of the August 14 incident victim on the runway. EX 1 at 69. Dr. Neesvig recommended that Claimant request leave from Wake Island to seek psychiatric treatment in Honolulu. TR at 54-55; CX 6 at 54-56; EX 1 at 16. Claimant testified that Dr. Neesvig told him to go to Honolulu because there was no therapy available on Wake Island. TR at 62-63. Dr. Neesvig testified that he does not consider himself a qualified psychiatrist. EX 1 at 16 and Ex 1 at 1-2.

Claimant said he acted on the doctor's recommendation and left the island a couple days later. He testified that he left because he "had to get off the island." TR at 55. He last worked for Employer on November 7, 2004. TR at 19.

An undated letter written by Ms. Kronstedt was admitted into evidence. TR at 38; CX 3 at 16. Claimant testified that he had read the letter. According to Claimant, the letter was written because Ms. Kronstedt was "trying to get help for the people on the island that had been involved with this accident," as "there were a number of people that were involved that had showed [*sic*] signs—including [Claimant]—of having been disturbed by the accident. TR at 38. The letter refers to "critical incident stress debriefing," which Claimant took to mean that Ms. Kronstedt was trying to get someone to come to the island to talk to him and others. TR at 38. According to Claimant, however, nothing ever happened. TR at 39.

Claimant testified that Ms. Kronstedt was Dr. Neesvig's assistant, that the two got along "terribly," and that Dr. Neesvig was "pretty mean" to Ms. Kronstedt. TR at 38-39. Dr. Neesvig testified that Ms. Kronstedt was his emergency medical technician who was supposed to function as a nurse, but he did not give her much responsibility because he did not feel that she was very capable. EX 1 at 13. In addition, Dr. Neesvig recalled that Claimant told him that Ms. Kronstedt told him that he probably had PTSD. This was one of the problems Dr. Neesvig had with Ms. Kronstedt – she felt she was a psychiatrist of sorts even though there was no evidence that she had such training. EX 1 at 64-65. Dr. Neesvig also opined that Ms. Kronstedt may have snuck medication to Claimant before November 3, 2004, and that she was "terrible" and "horrible." EX 1 at 70-71.

On November 4, 2004, Employer issued a termination letter to Claimant terminating his employment effective as of the close of business on November 5, 2004 based on Claimant's "continuing misconduct," including the argument with a Marine on October 30, 2004. TR at 55, 60-61, 64, 111; CX 5 at 53.

Claimant testified that he received the letter of termination dated November 4, 2004 on November 6, 2004, the day before he left the island. TR at 56-57, 64-65, 111. He later testified, however, that he does not recall the exact date he was told of his termination. TR at 111. He acknowledged that he may have received the termination notice on November 4, 2004. TR at 107.

Claimant testified that he saw Dr. Neesvig on November 3, 2004, before he received his termination notice. TR at 56; CX 6 at 54-56. He thought he received the termination notice the day before he left the island. TR at 56-57. He thinks that Dr. Neesvig would have reported the fact of Claimant's visit to Employer on the day of the visit, which he believes is "standard procedure." TR at 57. In fact, Dr. Neesvig's medical notes concerning Claimant's November 3, 2004 visit were transcribed by Charlotte Price, Employer's Human Resources representative. *See* CX 5 at 53; CX 6 at 55.

Claimant testified that he did not know whether his termination was based in any part on his going to Dr. Neesvig and reporting his problems. TR at 57. On December 28, 2004, however, Claimant told psychiatrist Ramzi Nassar that Employer subsequently terminated him "after his manager found out he requested help [from a physician]." CX 7 at 57.

Claimant further testified that he was terminated because he was raising environmental issues, and was not satisfied with the way the department was being run or with its inability to respond to large spills and other environmental problems due to lack of equipment. TR at 55-56.

Claimant testified that he did not know that he was about to be terminated when he went to see Dr. Neesvig. TR at 114. He further testified that he did not know or believe that he was going to be terminated after the argument with the Marine. TR at 114.

Claimant testified that in his experience, there was "extreme" use of alcohol on Wake Island and that nearly "everybody drank." TR at 63. Claimant felt his drinking habits were about the same as those of the others. TR at 63. He continued by stating that on most Saturday

nights, there was a party on the beach. TR at 63. To his knowledge, fights were rare. TR at 63-64. Claimant did not recall whether his termination was attributable in any way to his drinking, and he reiterated that he believed he was terminated due to the fight with his co-worker and the subsequent argument with a Marine. TR at 64.

Claimant testified that he did not contest his termination because he “had to get off the island.” TR at 64.

Claimant testified that Jim Collier was the manager of the fueling department on Wake Island. TR 40. Mr. Collier shared Claimant’s interest in diving and they became friends. TR at 40. Mr. Collier was at Wake Island when the incident occurred and according to Claimant, Mr. Collier knew of the lack of response to the accident because the fuel depot is near the runway. TR at 40. Claimant further testified that Mr. Collier’s November 4, 2004 letter was written on Claimant’s behalf which Claimant believes was intended “to help me get the treatment I needed.” TR at 41; CX 4 at 17. Claimant did not know to whom the letter was written, and said he did not ask Mr. Collier to write it. TR at 40-41. Claimant testified that the letters written by Mr. Collier and Ms. Kronstedt were not written on the same day that he was advised he was being terminated by Employer. TR at 106-107. He acknowledged, however, that he may have received his termination notice on November 4, 2004. TR at 107.

On November 7, 2004, Claimant was transported to Honolulu on the same flight as the station manager, Duane Penney. TR at 64-65. Claimant testified that Mr. Penney “was the cause of all of the problems, the misreporting of the incident, and follow-up environmental issues that had gone awry.” TR at 65. Claimant said Mr. Penney was sent into “forced retirement.” TR at 65. According to Claimant, Mr. Penney approached him on the plane and told him, “you and I were just pawns and we were both used.” TR at 65. Claimant said he did not reply.

After speaking with Employer’s HR representative Charlotte Price, Dr. Neesvig prepared and signed a Doctor/Medical Investigation report concerning Claimant’s November 3, 2004 infirmary visit, wherein he diagnosed Claimant with depressive anxiety and alcohol abuse, and ordered Claimant to return to Honolulu to seek psychiatric evaluation and treatment. CX 6 at 56. The report further states that Dr. Neesvig performed or recommended a psychiatric evaluation for Claimant and prescribed Ativan, 1 mg, for Claimant’s anxiety. *Id.* The report ends by recommending that Claimant obtain psychiatric help in Honolulu and noting that, as of November 3, 2004, Claimant had not lost any time from work due to his depressive anxiety/alcohol abuse. *Id.* Dr. Neesvig went on to note that it was “unknown” how much work Claimant might miss but that in Dr. Neesvig’s opinion, Claimant had no partial disability and no work restrictions. *Id.* Dr. Neesvig later testified, however, that he did not order Claimant to leave the island but he granted leave to obtain psychiatric help. EX 1 at 65.

On November 8, 2004, Employer’s HR Representative, Charlotte Price, prepared a Workers Compensation – First Report of Injury or Illness with respect to Claimant’s alleged illness from the August 14, 2004 accident, noting that Employer was first notified of the claim on August 21, 2004. CX 8 at 61.

Initially, Dr. Neesvig testified that he did not personally observe nor did he hear anyone report that there was any change in Claimant's behavior on Wake Island between the August 14, 2004 incident and November 2004, when Claimant left the island. EX 1 at 23. Dr. Neesvig later testified that as the treating physician on Wake Island, he observed that immediately before Claimant left the island, "he was probably more depressed than he had been in the past," and Dr. Neesvig "attributed that to the fact that he [Claimant] knew he was going to have to leave" and "because of the fact that he [Claimant] expected to be terminated." EX 1 at 30 -32.

Dr. Neesvig also testified that Claimant's supervisor, Mr. Tiley, would not even talk to Claimant before and after the August 14, 2004 incident because of his personality problems and Claimant knew he was soon leaving the island. EX 1 at 31. Dr. Neesvig concluded that his observation of Claimant being more depressed was made closer to his departure from Wake Island than to the August 14 incident. EX 1 at 32.

Later in his deposition, Dr. Neesvig further clarified his medical opinion as a treating physician by stating that while he had been trained in diagnosing PTSD, he did not do a complete psychiatric evaluation of Claimant on November 3, 2004, and could not say whether Claimant did or did not suffer from PTSD. EX 1 at 42-44. Dr. Neesvig further explained that he believed Claimant was depressed and needed some psychiatric help, but he could not give an opinion as to whether or not Claimant's condition was related to the August 14 incident. EX 1 at 44, 66. Dr. Neesvig opined that he "felt he [Claimant] needed psychiatric help before the [August 14] accident. Whether it was aggravated by the accident, I'm [Dr. Neesvig's] not qualified to say that." EX 1 at 44-45.

Later still in his deposition, Dr. Neesvig again opined that Claimant had had some personality and psychiatric problems which had lead him to conclude that Claimant was depressed when Dr. Neesvig first met him on the island. EX 1 at 47-48. Dr. Neesvig continued by stating that, "whether or not this [depression] was aggravated by his [Claimant's] observation of this injured man, I have no way of knowing that...." EX 1 at 48. Dr. Neesvig concludes by opining that Claimant seemed more depressed by his predicament in November 2004, and that Claimant's psychological problems "might have been aggravated by this [the August 14 incident] and I [Dr. Neesvig] don't feel like I can say they were or they weren't." EX 1 at 48, 58-59, and 66.

Dr. Neesvig opined that Claimant was psychologically disabled the entire time he was working for Employer on Wake Island, but he could not give an opinion whether Claimant might have been more suited to a different work environment than he was to the unique circumstances of Wake Island. EX 1 at 48-49.

Dr. Neesvig testified that he was not paid by anyone for his time being deposed on July 26, 2006, and that he was retired and did not testify at depositions for money. EX 1 at 59. He stated that in this case he was trying to help both lawyers and "to do what's right." *Id.*

After leaving Wake Island, Claimant testified that he stayed a couple of weeks in Honolulu but did not seek medical care because he was leaving for Alaska, where his parents lived. TR at 65. Thereafter, he went to Alaska, stayed with his parents, and sought medical care

from Dr. Nassar, a board certified psychiatrist. EX 2 at 6-7. Claimant said the insurance company told him they would set up an evaluation for him, and they set it up with Dr. Nassar. TR at 67. He believed the case worker for the insurance company was in Louisiana, and he said she never told him that he had a choice of physicians. TR at 66-67.

Claimant saw Dr. Nassar briefly on two occasions within an eight day period. TR at 66; EX 2 at 5. At his first visit on December 28, 2004, Claimant spent about half an hour with the doctor, who took a medical history and had Claimant explain what was bothering him. TR at 68-69. Claimant told Dr. Nassar that his symptoms included decreased ability to sleep, nightmares, flashback-like phenomenon, depressed mood, being easily startled, and that there were times when he felt numb and “spacey.” EX 2 at 10-11. He also told Dr. Nassar that he drank alcohol heavily although at times he used it less frequently, that he did not have a history of DWIs, and that he used the alcohol to help mitigate some of his symptoms. EX 2 at 12. Dr. Nassar did not know whether or not Claimant drank alcohol before the August 14, 2004 incident. *Id.*

Dr. Nassar generated a report, which is CX 7. Dr. Nassar diagnosed PTSD, which he opined was “work-related.” TR at 68. At his deposition, Dr. Nassar explained PTSD is defined in the Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV-TR”¹) as occurring “following exposure of extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury or other threat to the physical integrity of another person.” EX 2 at 8-9. I take administrative notice that the DSM-IV-TR further provides that in diagnosing PTSD, “[m]alinger~~ing~~ should be ruled out in those situations in which financial remuneration, benefit eligibility, and forensic determinations play a role.” DSM-IV-TR, at 467 (Emphasis in original).

Dr. Nassar’s PTSD diagnosis was based on Claimant’s subjective description of witnessing a fatal accident, which involved a fellow employee who was struck by a truck at a time when both the medic and the physician who were on the island were unavailable to render aid, with the result that Claimant had ensuing feelings of helplessness and hopelessness as he watched his fellow employee die, leading eventually to symptoms consistent with PTSD. CX 7 at 58; EX 2 at 10, 17. Claimant also told Dr. Nassar that he was fired from Wake Island because he sought medical help. CX 7 at 57. Dr. Nassar opined that Claimant was “forthcoming, and appeared to have a legitimate pathology,” and that he met the criteria for PTSD. CX 7 at 58-59. Dr. Nassar further opined that “if the story he [Claimant] gives is true, then I do feel this is a work related incident.” CX 7 at 59. He prescribed the anti-depressant Lexapro and Seroquel for sleep and recommended that Claimant should continue on these medications if he goes to Hawaii and should seek follow-up treatment there. TR at 66; CX 7 at 59.

Dr. Nassar explained in his deposition that he also diagnosed Claimant with unemployment, work-related issues as other social or psychological factors that may be impacting the main PTSD diagnosis. EX 2 at 14. Dr. Nassar further explained that he put unemployment down as an Axis IV diagnosis because that certainly impacts one’s finances and

¹ DSM-IV-TR’s proper citation is American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision, Washington, DC, American Psychiatric Association 2000. PTSD is described, and I take administrative notice of the DSM-IV-TR discussion of PTSD section 309.81 at pp. 463-468.

one's capacity to continue in treatment. *Id.* In addition, Dr. Nassar stated that Claimant was having work-related stressors that impacted the diagnosis. *Id.*

Dr. Neesvig questioned the accuracy of Claimant's report to Dr. Nassar in that the victim did not die on the runway as Dr. Nassar's report and the fire department medics were good medics. EX 1 at 67-68. Dr. Neesvig also questioned the accuracy of Claimant's statement to Dr. Nassar that Claimant was terminated by Employer after his manager found out he requested medical help from Dr. Neesvig. EX 1 at 69.

Dr. Nassar confirmed that at no time during Claimant's two office visits did Claimant tell him that he did not actually witness the accident which Dr. Nassar described above nor did he ever tell Dr. Nassar that he did not actually witness the death of the accident victim. Ex 2 at 13. Also, Dr. Nassar testified that Claimant told him that he was no longer working on Wake Island because of a fight he had with a fellow employee while intoxicated, and that he was terminated after his manager found out that he had sought help from the physician on the island. *Id.*

Dr. Nassar was later asked whether his diagnosis of Claimant would be different if rather than witnessing the actual accident, Claimant saw the injured individual after the accident had occurred. EX 2 at 16-17. Dr. Nassar opined that "that certainly may be enough depending on how horrific the injury is and how well, you know, what was going on and under what capacity he [Claimant] saw this gentleman and how his condition was deteriorating or not deteriorating, there certainly may be enough there that he would still be experiencing posttraumatic stress." EX 2 at 17.

Dr. Nassar was asked if he could comment about whether he thought Claimant was malingering. EX 2 at 39. He responded that he had only seen Claimant twice and could not comment specifically on whether Claimant was malingering. EX 2 at 39-40. Dr. Nassar further stated that nothing Claimant told him during the two visits led him to believe that Claimant was not telling the truth. EX 2 at 40.

At his second visit approximately one week later on January 5, 2005, Claimant told Dr. Nassar that he expected to go back to work at some point. TR at 68. Claimant testified that the medications had been helping him, his symptoms were subsiding and he had better concentration and sleep and less intrusive memories and flashbacks. TR at 68; CX 7 at 60; EX 2 at 18, 34-35. Dr. Nassar testified that there were common side effects from the medications none of which Claimant reported experiencing. EX 2 at 30-31. Claimant reported to Dr. Nassar that he was still having anxiety and depression and remained upset about how he was treated by Employer on Wake Island, including how he was placed at risk with no respirators and the circumstances of Claimant being fired from his job. CX 7 at 60; EX 2 at 18.

Dr. Nassar assessed Claimant with PTSD responding to medications and the plan was for Claimant to continue with Lexapro and Seroquel at bedtime and continued treatment. EX 2 at 19. Dr. Nassar told Claimant he wanted to set him up with someone for psychotherapy, but Claimant informed the doctor that he was planning to leave for Hawaii. TR at 69. Claimant alleged that Dr. Nassar was going to refer Claimant to someone in Hawaii for therapy, but instead of giving

Claimant a therapist referral he told Claimant that his workers' compensation claim had been denied by Employer and that Claimant should get a lawyer. TR at 69.

Dr. Nassar opined that the best and most reasonable treatment for Claimant in December 2004 and January 2005 was a combination of at least six to eight therapy sessions over two to three months and medication. EX 2 at 28, 42, 44. Dr. Nassar was unable to give Claimant therapy because he was leaving for another job. *Id.* He also noted that PTSD can, in some instances, depending on the severity of the disorder and the susceptibility of the individual, be a lifelong process and disorder and can become chronic. EX 2 at 43.

Dr. Nassar was asked whether Claimant's PTSD would have prevented him from working as an Environmental Specialist or technician as of December 28, 2004, January 5, 2005, and on the date of the deposition, August 11, 2006. EX 2 at 21-23. Dr. Nassar responded that at no time was he asked to assess Claimant's capacity to work, that he probably would have asked other types of questions and would have approached his evaluation of Claimant in a slightly different way if it were a return-to-work evaluation. *Id.* He felt he would need to know Claimant's specific job description in order to opine whether any restrictions prevented Claimant from returning to work. EX 2 at 21-22. Although Dr. Nassar did note that Claimant's symptoms were improving as of his second visit on January 5, 2005, he reiterated that he was not asked to evaluate Claimant in terms of his capacity to work and would not give any opinion about whether Claimant was totally or temporarily disabled from working in December 2004 or at any other time. EX 2 at 22, 41-42.

In late January 2005, Claimant went to Hawaii because he had been offered a job there. TR at 70. Claimant testified that his psychological issues had not completely resolved at this time, but the medications were allowing him to concentrate and to sleep at night. TR at 70. Claimant went back to work about a month after returning to Hawaii in late January 2005, and worked from February/March through May/June 2005. TR at 70-71, 75-76. He testified that the cost of moving to Hawaii exhausted his financial resources, and he was unable to pay for medical treatment. TR at 71. Claimant next testified that he called his insurance company about getting treatment, but the case worker "flat out laughed," and said that the accident victim "did not even die while you were standing there." TR at 71.

Claimant's new job was as an "estimator" for Ohana, an environmental firm in Hawaii. TR at 72. He testified that he was still taking medications, he wanted to work, and he was feeling "not so bad." TR at 72. He stated that he found that working got more difficult after his medications ran out. TR at 72. He stated that he could not sleep, was having nightmares, and could not concentrate on his job. TR at 72. He testified that his previous symptoms came back. TR at 72. Claimant testified that he believes this occurred because of a lack of treatment. TR at 72-73.

Claimant testified that his medical insurance coverage through his job did not start until May 1, 2005, and he could not afford medical treatment in the meantime. TR at 73, 114-15. When he finally did get medical coverage, he had a detached cornea. TR at 73-74. He went to an eye doctor nine times and had surgery. This led to vision problems which caused Claimant to miss some time at work but he was told this would not be a problem. TR at 74. Claimant did not

make any effort to schedule an appointment or see a psychologist in Honolulu after May 1, 2005. TR at 115.

Ultimately, Claimant was terminated from his job at Ohana in July 2005. TR at 74, 76. He testified that he was discharged because he was “not making enough money for the company” in bidding on jobs. TR at 115. He further attributes his termination to the accident of August 14, 2004, explaining that he “could have performed to the best of his ability had [he] been able to get a proper night’s sleep and been able to concentrate.” TR at 74-75. He said that during days at work, he would “just fade off,” and would find himself thinking about the incident 20 to 30 times a day. TR at 75. He testified that, “I deal with it all day long up until I go to bed. I deal with it when I’m laying there trying to go to sleep. It’s there when I wake up in the morning. It’s never gone.” TR at 75. Claimant further testified, however, that he did not recall ever being told by any doctor that he should not return to work or that he was or is disabled from working, but that no doctor has ever cleared him to go back to Wake Island. TR at 103-104, 116, 122.

Claimant stayed in Hawaii for about three weeks with his girlfriend to discuss his options after his losing his job, then left in or about July 2005. TR at 75-76. His girlfriend came to Hawaii some time between May and July, and they decided to go back to Canada, as she is a Canadian citizen. TR at 76. Claimant was hoping to eventually find work in Canada, but could not apply for a work permit in July 2005 because he was required to have a minimum of six months temporary residence in Canada before doing so. He said he could not afford medical treatment at that time. TR at 78. In October 2005, Claimant and his girlfriend went back to Hawaii to sell his car, close up his residence, and ship belongings to Canada. TR at 78.

Claimant also testified that as of October 2005, his nightmares and problems sleeping had worsened. TR at 78. He repeated that he was not able to work in Canada due to his symptoms and lack of a work permit. TR at 117-118. Claimant’s girlfriend supported him financially. TR at 79. He had a bout with shingles and sought treatment at a walk-in medical clinic. He told them he could not sleep and sleeping pills were prescribed. TR at 80.

At the time of trial, Claimant continued to reside with his girlfriend in Canada. TR at 79-80. He testified that he does not sleep more than a couple hours each night. If he wakes, he cannot go back to sleep, and sometimes he goes two to three days without sleep. TR at 80. He said that he does not have nightmares every night, and sleeping pills help to ward off the nightmares. TR at 80. He does not take sleeping pills every night because he does not like taking pills. TR at 81.

Claimant testified that he had not yet qualified for free health care in Canada. TR at 115. He said he had received his temporary residency a couple of weeks before the August 17, 2006 trial in this matter, and had applied for medical benefits. TR at 115-116. According to Claimant, that application is “now pending on my work permit.” TR at 115-116. Claimant has been in Canada since October or November 2005, and said it took from January 2006 until July 2006 for him to get temporary residency status. TR at 115-116.

In about January 2006, Claimant filed for a work permit in Canada. TR at 76-77 and 115-116. He testified that at the time of hearing, he was still waiting for the permit. TR at 78. He said that although he has been offered jobs, it would be illegal to work without the permit. TR at 78-79. Claimant stated that there is so much work in Alberta, Canada that “they’re just trying to hire anybody they can including people making \$21.50 an hour working at a fast food restaurant.” TR at 119. Claimant did not indicate that he would be restricted from any type of work once he obtained his work permit.

With regard to his drinking, Claimant testified that he does not drink daily but when he does drink, he drinks too much. TR at 81. He said that every couple weeks, he drinks a whole bottle of whiskey “to sleep, and to forget.” TR at 81. He testified that drinking and getting drunk helps him sleep. TR at 82. Claimant testified that he, not his girlfriend, pays for his drinking and he spends about \$30 to \$40 per month on his drinking habit. TR at 120.

Claimant testified that he wants to get “help,” does not want to spend the rest of his life dependent on pills or alcohol, and wants “to be able to live my life like it was before I went to Wake Island.” TR at 84. He further testified that he wants to go back to work, and is optimistic that with counseling or mental help, he can get back to supporting himself and “being proud of what I can accomplish with my life.” TR at 84-85.

IV. CONCLUSIONS OF LAW

The following conclusions of law are based on my observation of the appearance and demeanor of the witness who testified at the hearing, and upon an analysis of the entire record, the arguments of the parties, and applicable regulations, statutes, and case law.

A. Credibility

I am entitled to determine the credibility of the witnesses, to weigh the evidence and draw my own inferences from it, and I am not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). In addition, as the fact-finder, I am entitled to consider all credibility inferences, and can accept any part of an expert’s testimony or reject it completely. *See Avondale Shipyards, Inc. v. Kennell*, 914 F.2d 88, 91 (5th Cir. 1988). An administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961).

1. *Claimant*

Claimant communicated clearly at trial and occasionally became emotional. However, as discussed below, I have grave doubts about Claimant’s credibility and the validity of his subjective complaints.

Claimant essentially alleges that he left Wake Island and his job with Employer on or about November 5, 2004 because Dr. Neesvig recommended that “Claimant leave the island and seek psychiatric help.” ALJX 8 at 2-3 (citing CX6/55). Stated differently, Claimant argues that he “was fired because he got injured and that the doctor [Dr. Neesvig] told him to get off the island ... [a]nd as the doctor’s help was being provided, they [Employer] didn’t like that [and terminated Claimant’s employment].” EX 2 at 20. The record simply does not support this argument, however.

I find that Claimant’s testimony was inconsistent and was contradicted by other evidence in the record. Having had the opportunity to observe Claimant’s demeanor, and on the basis of the record before me, without there being any independent witnesses who testified under penalty of perjury to corroborate Claimant’s account of his alleged work injury, I find that Claimant was not a credible witness. Specifically, the inconsistencies in Claimant’s testimony, the false factual history he gave to Dr. Nassar, Claimant’s behavior, and the presence of contradictory evidence in the record lead me to conclude that Claimant has not established that he suffered a work-related injury. I find that Claimant has completely ignored Dr. Nassar’s recommendation that he seek psychological therapy even while taking time to seek medical care for various physical ailments. I further find that Claimant would work if he had a Canadian work permit and is not restricted from working in Canada, the United States, or anywhere else by reason of an alleged psychological condition.

I find that the strong weight of the evidence and Claimant’s testimonial inconsistencies establish that Claimant was terminated by Employer for having engaged in an alcohol-induced argument on October 30, 2004, despite having been terminated earlier due to a similar incident on September 19, 2004, which termination was later rescinded due solely to a technicality. I further find that, after the accident occurred on August 14, 2004, Claimant waited until November 3, 2004 to seek medical assistance for his alleged psychiatric condition only in an attempt to substantiate a disability unsupported by evidence, and only after he knew he would lose his job.

The inconsistencies which, in my view, raise substantial doubts about Claimant’s veracity include the following examples:

1. Claimant testified that he did not actually see the August 14, 2004 accident occur but was one of the first responders after an ambulance had arrived on the scene. TR at 32; CX 5 at 52. He also admitted that he did not witness the death of the accident victim, as the victim died while being air-lifted to Guam after treatment at the infirmary. TR at 99-100; CX 5 at 25, 31, 33, and 36; EX 1 at 38. Yet, Claimant told psychiatrist Dr. Nassar in December 2004 not only that he witnessed the fatal accident on August 14, 2004, but also that he had watched his fellow employee die. CX 7 at 58; EX 2 at 10, 17. I find that both of these statements were false. In addition, Claimant also falsely told Dr. Nassar and testified under oath at trial that he had never had any past psychiatric treatment, counseling, or other psychiatric interventions prior to his stint on Wake Island. TR at 25; CX 7 at 58. Claimant later testified, however, that prior to the accident of August 14, 2004, he had been prescribed Zyban, also known as Wellbutrin and that he knew that the drug was an antidepressant. TR at 101-102; EX 1 at 73. Although the drug may well

have been prescribed to help Claimant quit smoking, there is no indication that Claimant informed Dr. Nassar of this pertinent medical history.

2. Mr. Tiley, Claimant's supervisor, instructed Claimant to speak with Dr. Neesvig about Claimant's concerns immediately after witnessing the aftermath of the August 14 incident, but Claimant refused to do so. CX 5 at 52. Claimant testified that he refused to see Dr. Neesvig earlier than November 3, 2004 because he believed the doctor was not compassionate. TR at 51. Claimant told Dr. Nassar that Employer terminated his job after his supervisor found out Claimant had requested help from Dr. Neesvig. CX 7 at 57; EX 2 at 20. At trial, Claimant changed his story and testified that he did not know whether his termination was based in any part on his reporting his problems to Dr. Neesvig. TR at 57. He further testified that he was terminated for raising environmental issues. TR at 55-56; CX 7 at 60; EX 2 at 18. Claimant later admitted that the reason for his termination was that he had been in a fight with a co-worker and had also been involved in another argument with a Marine. TR at 60, 64. Claimant then re-confirmed that his termination occurred after his October 30, 2004 altercation with some Marines. TR at 111.
3. Claimant testified that he was unaware that he was about to be terminated when he went to see Dr. Neesvig on November 3, 2004. TR at 114. However, Dr. Neesvig testified that it is his recollection that when he met with Claimant on November 3, 2004, Claimant was about to leave Wake Island and wanted something in his employment records about psychological problems he was having. EX 1 at 16, 22. Dr. Neesvig testified that he did not notice Claimant's psychological condition worsen following the August 14 accident. EX 1 at 66. Dr. Neesvig further observed that Claimant's psychological condition worsened because Claimant expected to be fired. EX 1 at 30 -32, 66.
4. Claimant testified that he had thought about the accident of August 14, 2004 every day for two years, including up through the date of this trial, and that he had symptoms which interfered with his sleep and concentration. TR at 36. However, Claimant's own actions during this period do not support his assertions about the magnitude of his symptoms. He did not see any physician about his alleged symptoms until he saw Dr. Neesvig on November 3, 2004, which was *after* he had been involved in the two incidents in September and October 2004 which resulted in his termination, as described above. Claimant did not attribute his fight on September 19 to any residuals he was experiencing from the August 14 incident. Instead, he testified that the employee he fought with had "continually harassed" him and after the fight, Claimant never had another problem with that employee. TR at 46-48. Even after leaving Wake Island, having seen Dr. Nassar twice briefly within an eight day period and having obtained from him a prescription for medication and a recommendation that he seek therapy to help his symptoms, Claimant chose not to pursue any further therapy or medication, even while he subsequently saw a doctor nine times for an eye problem and later went to a free medical clinic for shingles. TR at 73-74, 80, 115. It is also noteworthy that Claimant's social functioning does not appear to have been hindered by his alleged psychological condition, as the evidence shows that he freely traveled to and from Alaska, Hawaii, and Canada, both with and without his girlfriend. TR at 65, 69, 72, 75-80.

5. Claimant's testimony about the prevalence of his symptoms is not supported by any medical evidence in the record. Claimant admitted that no doctor has ever told him that he should not return to work or that he was or is disabled from working. TR at 103-04, 116, 122. At no time did Dr. Nassar perform psychological testing or rate or opine about the extent of Claimant's alleged mental impairment, if any. On the contrary, Dr. Nassar first guessed and then stated that he had no opinion about whether Claimant could return to work on Wake Island or elsewhere, although he was aware that, Claimant voluntarily chose to return to work in Hawaii, another an island location, in early 2005. EX 2 at 21-23, 41-42. Finally, Claimant fully expected to work one of the many jobs available once he received his work permit without reference to any work restrictions.
6. Claimant testified that he did not have any disciplinary or other work-related problems on Wake Island before the August 14, 2004 incident. However, his personnel file references a drinking incident at Wake Island on July 17, 2004. TR at 28, 92-93; CX 5 at 52. Moreover, Claimant testified that he had a problem with a fellow employee on Wake Island prior to the August 14 incident; he had two "write-ups" with Employer while working in Alaska; and, also in Alaska, he refused to follow his manager's order to authorize reentry into a building due to what Claimant perceived to be unsafe conditions. TR at 24, 26-28. Claimant similarly complained about unsafe conditions concerning his environmental work and the lack of safety equipment while on Wake Island as he did previously on Shemya in Alaska. TR at 26-28, 44-47, 49-50; CX 1 at 1. In my view, these instances tend to demonstrate that Claimant has experienced what is perhaps more than the usual amount of discord in the workplace well before the accident on Wake Island.
7. I find that Claimant's inconsistent work history raises doubts about his work ethic and his ability to hold onto steady employment. Other than an eight-year stint with one company, Claimant's jobs have been of short duration and have involved other terminations and lay-offs. TR at 86-88. Specifically, I note that Claimant worked as an estimator bidding on jobs for environmental work and was terminated after six months for failing to get enough work for the company, and that this occurred well before he was terminated by Employer on Wake Island. After the August 14, 2004 incident Claimant subsequently worked at Ohana as an estimator bidding on jobs for environmental work, and again was fired for failing to get enough work. TR at 87.
8. Claimant told Dr. Nassar that the victim August 14, 2004 accident was a fellow employee when, in fact, he was employed by another contractor. TR at 33; CX 7 at 57. I find that this statement was misleading and inaccurate at best, or an outright lie at worst.

In sum, the record before me reflects that Claimant was a worker who had some behavioral problems which at times bordered on insubordination, who appears to have functioned the same both before and after the August 14, 2004 incident, and who did not reference any psychological trauma until he knew or strongly suspected that he would be terminated in early November 2004. After his termination, Claimant chose not to pursue any psychological treatment or therapy even though he did seek medical care for other physical

ailments. Viewed in their totality, I find that the above referenced examples demonstrate that Claimant's testimony is riddled with inconsistencies and/or falsities, and that is frequently contradicted by other evidence in the record. Accordingly, it is my conclusion that Claimant is not a credible witness.

2. Dr. Neesvig

When Dr. Neesvig was deposed, he was no longer in practice and testified that he left Wake Island as of February 2005. EX 1 at 10-11, 55, 59. Dr. Neesvig credibly testified that he was retired and was not testifying for money but, instead, to help the lawyers in this case and to "try to do what's right." EX 1 at 59. I find that Dr. Neesvig, a percipient witness, had no particular reason to lie. Most significantly in this regard, Dr. Neesvig testified that Claimant was a loner who did not relate well to the fellow Americans on Wake Island or to the 200 Thai workers, and that these problems existed both before and after the August 14, 2004 incident. The record is full of examples which support this, as Claimant himself described his nomadic work history where, but for one job, he floated from place to place and from job to job. Claimant also testified about problems he had with supervisors in Alaska and on Wake Island both before and after the August 14 incident, as well as being terminated from estimator positions both before and after that incident.

I find that Dr. Neesvig's testimony, as a treating physician and percipient witness, but not as a psychiatrist or psychologist, is particularly credible as to his personal observations that Claimant had a personality disorder during his entire time on Wake Island. I further find that Dr. Neesvig credibly testified that when he met with Claimant on November 3, 2004, he believed Claimant was already set to leave Wake Island and wanted something in his employment records about the alleged emotional problems he was having. EX 1 at 16, 22. Dr. Neesvig also credibly testified about his observation that Claimant's psychological condition worsened because Claimant "knew he was going to have to leave [Wake Island] ...because he expected to be terminated." EX 1 at 30 -32.

3. Dr. Nassar

I find that Dr. Nassar's deposition testimony was credible. In particular, I credit his testimony that work conditions existed which may have caused PTSD, depending on Claimant's capacity, even if Claimant did not actually witness the August 14, 2004 accident or the victim died outside of Claimant's presence. EX 2 at 17. I find that Dr. Nassar's testimony, in conjunction with Dr. Neesvig's confirmation that the accident scene was "horrific," is adequate to establish that the events of August 14, 2004 potentially could create a PTSD condition in an observer.

However, I find it noteworthy that Dr. Nassar opined that, "*if the story he [Claimant] gives is true*," then I do feel this is a work related incident." CX 7 at 59 (Emphasis added). As explained above, Claimant's relation of the specific events of August 14, 2004 to Dr. Nassar contained several material inaccuracies. In my view, this undermines the credibility of Dr. Nassar's opinion as to the nature and cause of Claimant's condition as well as the lack of

longitudinal history between Dr. Nassar and Claimant as two visits in a mere eight days without any psychological testing is inadequate for a reliable psychiatric evaluation.

Finally, I note that Dr. Nassar guessed and then declined to offer an opinion as to whether Claimant could return to work or was in any way restricted from performing his job as an Environmental Specialist. Dr. Nassar did opine that people with PTSD may be disabled from work, or they may be able to work with it. Specifically with respect to Claimant, however, Dr. Nassar testified that he did not and could not evaluate Claimant's ability to work. EX 2 at 21-23, 39, 41-43. I find that Dr. Nassar credibly testified that he was not retained to offer this type of opinion, and that he would need more information about Claimant's specific job duties before he could determine whether Claimant was able to work.

4. *Ms. Kronstedt & Mr. Collier*

Claimant submitted CX 3, an undated letter purportedly written and signed by Darby Kronstedt, and CX 4, a letter dated November 4, 2004, purportedly written and signed by Jim Collier. Neither letter is in the form of an affidavit signed under penalty of perjury. I admitted the letters into evidence as letters from non-medical percipient witnesses, and stated that I would weigh their value to the case after reviewing the entire record. TR at 9-10.

I give little weight to either CX 3 (Ms. Kronstedt's letter) or CX 4 (Mr. Collier's November 4, 2004 letter), as neither was not signed under penalty of perjury and their reliability is therefore questionable. In addition, without having the opportunity to observe the witnesses in person, or to have them subjected to cross-examination, I find that it would be unfair to give weight to their unchallenged and potentially biased statements.

In addition, in Ms. Kronstedt's case, there is no evidence showing that she is qualified as a medical doctor or psychologist to opine about Claimant's medical condition. Dr. Neesvig did not think much of Ms. Kronstedt and knew her well as the medic working alongside him. *See also* EX 1 at 64-65. Finally, much of Ms. Kronstedt's letter references events and evaluations concerning Claimant about which she has no personal knowledge or experience to provide meaningful testimony, or which are contradicted by other facts. For example, Ms. Kronstedt states that alcohol was not a problem for Claimant before the August 14 incident. However, the evidence shows at least two incidents before August 14, 2004 where Claimant's alcohol use brought about either a write-up or an observation. *See* CX 5 at 52 and EX 1 at 17-19.

Mr. Collier's letter references Claimant's increased problems at Employer after the August 14, 2004 incident, also without any noted medical qualifications. In addition, while Mr. Collier offers his unqualified opinion that Claimant's changed behavior after the August 14 incident appeared to be attributable to Claimant having attended the after-math of the August 14 incident, Mr. Collier ignores or was unaware of the fact that Claimant increasingly had personality conflict problems with his supervisor in Alaska and experienced a similar intolerance to Mr. Tiley and Employer's alleged safety violations. *See* TR at 24, 26-28, 44-47, 49-50, 55-56; CX 7 at 60; EX 2 at 18.

For the reasons explained, I give little weight to the opinions expressed in the letters purportedly authored by Ms. Kronstedt and Mr. Collier.

B. Causation

1. The Section 20(a) Presumption Has Not Been Invoked

Although it must be recognized that the Act is to be construed liberally in favor of the claimant and all factual doubts are to be resolved in his favor, the claimant nevertheless has the burden of establishing a prima facie case of compensability. See *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Wheatley v. Adler*, 407 F.2d 30 (D.C. Cir. 1968); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). To carry this burden, a claimant must show that he sustained harm or pain, and that an accident occurred in the course of employment or conditions existed at work which could have caused the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000). Once this prima facie case is established, a presumption arises under section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. However, the claimant is not aided by the section 20(a) presumption when seeking to establish either element of his prima facie case. See *Carter v. General Elevator Co.*, 14 BRBS 90 (1981). Accordingly, in order to invoke this presumption, a Claimant must produce evidence indicating that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. See *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981) (Emphasis added).

The section 20(a) presumption is also applicable in psychological injury cases. *ManSHIP v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, Claimant must establish a *prima facie* case that he has a psychological impairment and that an accident occurred or that working conditions exist which could have caused or aggravated the impairment. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Thus, the presumption cannot be invoked if a Claimant shows only that working conditions existed that could have caused a particular type of impairment but does not prove the existence of the alleged impairment.

I find that it is reasonably clear from the medical evidence and the August 14, 2004 accident report that working conditions existed on August 14, 2004 which could have caused Claimant to develop PTSD, as he alleges.

Dr. Neesvig's opinions that such working conditions existed are primarily set forth in his deposition testimony of July 26, 2006. EX 1. Dr. Neesvig recounted the "horrific" condition of the accident victim after he was hit by a truck and before he was taken to the island infirmary, which condition was undisputedly witnessed and observed by Claimant on August 14, 2004.

Dr. Nassar's opinion regarding Claimant's alleged work-related PTSD is contained in his medical report and explained at this deposition on August 11, 2006. CX 7 at 57-60; EX 2. Dr. Nassar was specifically asked whether his diagnosis of Claimant would be different if he were told that rather than witnessing the actual accident, Claimant saw the injured individual

immediately after the accident occurred. EX 2 at 16-17. Dr. Nassar opined that “that certainly may be enough depending on how horrific the injury is and how well, you know, what was going on and under what capacity he [Claimant] saw this gentleman and how his condition was deteriorating or not deteriorating, there certainly may be enough there that he would still be experiencing posttraumatic stress.” EX 2 at 17. Dr. Nassar explained that according to the DSM-IV-TR, PTSD may occur “following exposure of extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury or other threat to the physical integrity of another person.” EX 2 at 8-9. Here, as previously noted, it is undisputed that Claimant had “direct personal experience” of an accident involving “threatened death or serious injury” to the accident victim.

I find the above referenced evidence sufficient to establish that Claimant has satisfied the second of the two pre-conditions for invoking the section 20(a) presumption of causation, that work conditions existed which could have caused the psychological impairment alleged. The evidence concerning whether Claimant had any actual psychological impairment resulting from the August 14, 2004 incident, however, is far from clear. Indeed, there are substantial conflicts in this evidence.

a. Evidence that Claimant Has a Psychiatric Impairment Resulting From the August 14, 2004 Incident

In essence, the evidence of Claimant’s alleged psychiatric condition resulting from the August 14, 2004 incident consists entirely of Claimant’s own subjective representations of his symptoms at trial and as reported to Drs. Neesvig and Nassar. Claimant alleges that he has a psychiatric condition involving PTSD which he believes is work-related and is therefore compensable under the Act.

Claimant testified that witnessing the accident on August 14, 2004 has produced long-lasting effects on him. TR at 41. He further testified that he started to “fall apart” after the incident on August 14, 2004. TR at 45. He said he has thought about the incident every day for two years, he cannot go to sleep at night because of it, and he “can’t think straight everyday.” TR at 36. He further testified that after the accident, his sleep patterns changed, and he started having “severe nightmares.” TR at 42. Claimant testified that he could not sleep and when he did, he would wake up and be unable to get back to sleep. TR at 42. He said he gets four hours of “solid” sleep a night. TR at 42. He testified that the only way he was able to sleep was to drink alcohol. TR at 45. Claimant also said before the accident he would drink occasionally with friends, but after the incident he would drink just to get to sleep. TR at 46. He testified that he would have three to four drinks every night, enough to get him to sleep but not enough to make him drunk. TR at 46.

Claimant testified that in waking hours, he loses his concentration and cannot focus. TR at 43. After leaving Wake Island, Claimant’s new job was as an “estimator” for Ohana, an environmental firm in Hawaii. TR at 72. He testified that he was still taking medications, he wanted to work, and he was feeling “not so bad.” TR at 72. He found that working got more difficult after his medications ran out. TR at 72. He stated that he could not sleep, was having nightmares, and could not concentrate on his job. TR at 72. He testified that his previous

symptoms came back. TR at 72. Claimant testified that he believes this occurred because of a lack of treatment. TR at 72-73.

Claimant also testified that as of October 2005, his nightmares and problems sleeping had worsened. TR at 78. He repeated that he was not able to work in Canada due to his symptoms and lack of a work permit. TR at 117-118. Claimant's girlfriend supported him financially. TR at 79. He had a bout with shingles and sought treatment at a walk-in medical clinic. He told them he could not sleep and sleeping pills were prescribed. TR at 80.

At the time of trial, Claimant continued to reside with his girlfriend in Canada. TR at 79-80. He testified that he does not sleep more than a couple hours each night. If he wakes, he cannot go back to sleep, and sometimes he goes two to three days without sleep. TR at 80. He said that he does not have nightmares every night, and sleeping pills help to ward off the nightmares. TR at 80. He does not take sleeping pills every night because he does not like taking pills. TR at 81.

Claimant has provided consistent and similar descriptions of his alleged symptoms to both Drs. Neesvig and Nassar. CX 6 and CX 7. I note, however, that Dr. Neesvig is unqualified to opine about Claimant's alleged psychiatric condition as he is a family physician and not a psychiatrist or psychologist. EX 1 at Ex 1 attached thereto. Dr. Nassar diagnosed Claimant with PTSD based on Claimant's subjective symptom statements, his factually inaccurate description of the accident at Wake Island, and a false medical history, which information he obtained from Claimant during two brief encounters over a period of eight days.

*b. Evidence that Claimant Does Not Have a Work-Related
Psychiatric Condition Resulting from the August 14, 2004 Incident*

Employer contends that Claimant is not credible with respect to the allegations of his psychological condition and that he was terminated from his job with Employer for cause after a second fighting incident on October 30, 2004. Employer further argues that Claimant's first visit to island treating physician Dr. Neesvig on November 3, 2004 was simply a last-ditch attempt by Claimant to salvage compensation from Employer after he knew he was going to be fired. In addition, Employer alleges that Claimant lied to Dr. Nassar in December 2004 by telling the psychiatrist that he actually witnessed the victim being struck by the truck on the airport runway and that he also saw him die – both statements being false. Claimant also did not mention to Dr. Nassar his prior use of antidepressants before traveling to Wake Island.

A claimant's *credible* subjective complaints of symptoms can be sufficient to establish physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). (Emphasis added.) However, as discussed above in the *Credibility* section of this Decision, I have grave doubts about Claimant's credibility and the validity of his subjective complaints.²

² While subjective complaints alone should not be the basis for dismissing a doctor's opinion where a psychological injury is alleged, as evidenced in the *Pietrunti v. Director* case, (119 F.3d 1033 (2nd Cir. 1997)), that case is distinguishable and inapplicable here because it is simply not that Claimant's complaints were subjective, but rather subjective and *not trustworthy*.

Here, the only evidence of Claimant's alleged symptoms was not formally disclosed and did not otherwise come to light until November 3, 2004. I find that on November 3, 2004, Claimant knew or must have seriously suspected that he would be terminated for having once again been involved in an alcohol-induced fight or argument, even after he was informed of Employer's zero tolerance policy for such behavior. CX 6.

The evidence of Claimant's symptoms comes from Claimant alone. At trial, he did not produce any witnesses to his alleged psychiatric condition such as his girlfriend or his parents. Nor did he introduce any reliable deposition transcripts or sworn affidavits from Ms. Kronstedt, Mr. Collier, or any other workers on the island. Thus, Claimant's testimony that he suffered a work-related psychiatric injury from the August 14, 2004 incident stands uncorroborated. As explained above, and having considered the entirety of the record evidence, I find that Claimant is not credible and I give no weight to his description of the symptoms he alleges were caused by the August 14, 2004 incident.

In discrediting Claimant's testimony, I give great weight to the inconsistencies in his story noted above and the suspicious timing of the disclosure of his alleged psychiatric condition as it related to his job termination. In this regard, I note that Employer, Dr. Neesvig, and even Claimant himself admit that his termination was the result of his improper behavior rather than due to his seeing Dr. Neesvig, as Claimant falsely reported to Dr. Nassar. As referenced above, the record also contains numerous other inconsistencies which are sufficiently prevalent to cast substantial doubt on the Claimant's veracity.

Moreover, at no time did Dr. Nassar rule out that Claimant was "malingering," as required for a PTSD diagnosis in cases such as this one, where Claimant is seeking financial remuneration and benefit eligibility. Dr. Nassar stated that he had only seen Claimant twice and could not comment specifically on whether Claimant was malingering. EX 2 at 39-40. As previously noted, to the extent that Dr. Nassar's opinion supports a diagnosis of PTSD, the weight of that opinion is significantly diminished by Claimant's provision to him of an inaccurate factual account of the accident and medical history. Dr. Nassar never evaluated Claimant based on the true facts of the work incidents, the reason for Claimant's termination, and Claimant's prior use of antidepressants and alcohol.

Since there are no independent witnesses who corroborate Claimant's account of his alleged work injury, the purported proof of such injury consists entirely of Claimant's own representations. In many instances the representations of a claimant concerning a work injury are by themselves sufficient to satisfy the second requirement for invoking the subsection 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). However, such representations must be credible in order to satisfy a claimant's burden, and in this case such credibility is lacking. In light of the testimony and the other evidence which raises substantial doubts about Claimant's veracity, I cannot find that Claimant has satisfied his burden of proving that he suffered a work-related psychiatric injury or disability.

I find in light of the foregoing that Claimant has failed to show by credible evidence that he actually developed PTSD or that he developed or aggravated any other psychiatric condition as a result of witnessing the aftermath of the August 14, 2004 incident. Accordingly, Claimant has failed to establish his prima facie case by proving that a psychiatric injury occurred in the course of employment which could have caused his condition.

C. Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to a claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. *Id.* at 1266

Claimant has the burden of proving the nature and extent of his disability without the benefit of the section 20 presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once a claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). While a claimant generally need not show that he has tried to obtain employment, *Shell v. Teledyne Movable Offshore, Inc.*, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. *Wilson v. Dravo Corporation*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Company*, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant could have returned to his usual occupation as an Environmental Specialist at all times from November 5, 2004 and thereafter, and that he was properly terminated by Employer for his behavior conflicts. Other than one speculative statement where Dr. Nassar "insinuated" Claimant's ability to return to work, Dr. Nassar clearly testified that he was not capable of opining about Claimant's ability to return to work as an Environmental Specialist as he did not have an adequate understanding of the job duties required. See EX 2 at 21-23 and 28. Accordingly, I find Claimant had no disability at any relevant time after August 14, 2004.

D. Other Issues

Since it has been determined that Claimant's claim is not compensable under the Act, it is unnecessary to resolve the other issues in dispute.

ORDER

Claimant's claim for benefits under the Longshore and Harbor Workers' Compensation Act is hereby **DENIED**.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California